85-1285

NO.

Supreme Court, U.S.
FILED
JAN 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

JO ELLEN D. BAILEY,

PETITIONER

VS

COMMONWEALTH OF PENNSYLVANIA,

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPERIOR COURT OF PENNSYLVANIA

PHILADELPHIA OFFICE

ALLEN H. SMITH
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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

I.

QUESTIONS PRESENTED FOR REVIEW

A. Did the Commonwealth violate the Petitioner's right to counsel when police elicited information from her at York County Prison without counsel's consent and used the information to further its investigation and to prosecute the Petitioner at trial?

B. Did the offer of a plea bargain by the District Attorney to the Petitioner, in reliance upon which Petitioner released witnesses under subpoena, notified character witnesses of her intention to plead guilty to manslaughter, and granted an interview with the District Attorney, and subsequently the disavowing of the plea bargain by the District Attorney, violate the Petitioner's right to a fair trial?

C. Did the pre-trial publicity, which emanated from statements made by the District Attorney, after his breach of the aforesaid

plea bargain, and which caused Petitioner to lose testimony of character witnesses, unconstitutionally interfere with Petitioner's rights to due process of law?

D. Did the District Attorney violate the Petitioner's right to the effective assistance of counsel where he did not announce until the commencement of trial that he intended to try the case for the Commonwealth, having earlier admitted in open court that his representation would prejudice the Petitioner and that he was appointing an Assistant District Attorney to try the case; thereby foreclosing Petitioner's right to move for appointment of an out-of-county prosecutor, and permitting the Commonwealth to try the case with benefit of illegally obtained information?

II.

PARTIES TO THE PROCEEDING

Jo Ellen D. Bailey, Petitioner

Commonwealth of Pennsylvania, Respondent

III.

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OPINIONS BELOW

The decision of the Court of Common Pleas of York County, Pennsylvania has not been reported.

The decision of the Superior Court of Pennsylvania has not been reported.

The decision of the Supreme Court of Pennsylvania has not been reported.

Copies of the unofficial reports appear in the Appendix to this petition, (hereinafter referred to as "Appendix").

VI.

JURISDICTION

The judgment sought to be reviewed was rendered by the Superior Court of Pennsylvania on January 23, 1985, and entered January 23, 1985. Reargument was denied on March 28, 1985. The jurisdictional statute relied upon is 28 U.S.C. §1275(3). Allocatur was refused by Supreme Court of PA. on Nov. 12, 1985.

VI.

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment to the United States Constitution:

> No person...shall be compelled in any criminal case to be a witness against himself, nor shall be deprived of life, liberty or property without due process of law....

Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Fourteenth Amendment to the United States Constitution; Section 1, Paragraph 1:

> ...nor shall any state deprive any person of life, liberty, or property without due process of law....

VIII

STATEMENT OF CASE

Petitioner was one of two individuals charged with the murder of the Petitioner's child. The other, Larry Hake, was convicted of first degree murder, and has admitted to administering the blows which were established to have caused the child's death.

On April 2, 1982, Petitioner was arraigned and counsel appeared. On or about April 21, 1982, Officer Daniel Garber, the investigating officer, appeared at York County Prison, had Petitioner brought to him in a private conference room, and conversed with her for fifty minutes without obtaining the consent of her or her counsel. Petitioner advised Officer Garber at the beginning of the interview that she did not want to talk about her case; nevertheless Officer Garber continued to encourage Petitioner to talk and did talk to her for

fifty minutes after she had effectively pleaded the Fifth Amendment. At the time of the interview, Officer Garber knew that Petitioner was represented by counsel.

On May 3, 1982, Petitioner moved to suppress the interview and to prevent its use in the investigation:

> The information and statements obtained from Jo Ellen D. Bailey were in violation of her right to counsel, and were obtained in violation of her 5th Amendment, 6th Amendment and 14th Amendment rights under the Federal Constitution....(emphasis supplied)

Motion to Suppress, para. #6.

On May 6, 1982, the Court of Common Pleas of York County, Pennsylvania, found that nothing was obtained from the interview which could be used in the prosecution of the case; therefore, it dismissed the Motion to Suppress and to Dismiss.

Two pieces of information were obtained from the interview, however.

Testimony on May 6, 1982, showed:

1. Officer Garber learned that Petitioner and Larry Hake were corresponding (Petitioner's testimony, p. 26); and

2. Officer Garber found out which female prisoners Petitioner knew. (Officer Garber's testimony, pg. 13).

At trial on November 5, 1982, Commonwealth introduced parts of a letter from the Petitioner to Larry Hake; one of Petitioner's "friends" in jail had intercepted it. The contents of the letter appear in Appendix I. The friend who intercepted the letter testified for the Commonwealth at trial.

Petitioner moved to suppress the letter in camera on November 3, 1982. (In Camera Proceedings, p. 10).

On November 10, 1982, Petitioner

renewed her objection to the interview in her Post-Trial Motion on page 41:

> Clearly this (Ofcr. Garber's) interview based on the above facts violated the 5th and 6th Amendment rights of the Appellant. (emphasis supplied)

On February 9, 1983, the Court of Common Pleas of York County, Pennsylvania rejected Petitioner's argument. See Appendix B at APP-22 . On March 11, 1983, the Court of Common Pleas of York County, Pennsylvania, entered judgment of sentence. See Appendix B at APP-22.

On April 14, 1983, Petitioner filed a timely appeal with the Superior Court of Pennsylvania. In her brief, she objected to the interview:

> Did the Commonwealth violate the Constitutional right of the Defendant/ Appellant, when Ofcr. Garber, with the permission and consent of the District Attorney, interviewed the Defendant/Appellant, at the York County Prison? (emphasis supplied)

See Appendix A at APP-3 . On January 23, 1985, the Superior Court affirmed the judgment of sentence. See Appendix A at APP-3 . On March 28, 1983, reargument was denied. See Appendix A at APP-4 .

On April 26, 1985, Petitioner filed a timely Petition for Allowance of Appeal with the Supreme Court of Pennsylvania, the highest reviewing court in the Commonwealth. On page 1 of her Petition, she queried:

> Whether the Commonwealth violated Appellant's 5th, 6th, and 14th Amendment rights when the investigating police officer, with knowledge that the Appellant was represented by counsel, interviewed the Appellant prior to her trial at the York County Prison, without counsel's knowledge or consent.

On November 12, 1985, the Supreme Court denied appeal. See Appendix C at APP-24 .

THE PLEA BARGAIN

On or about July 14 and 16, 1982, after Petitioner had undertaken extensive

pre-trial discovery, trial preparation, and subpoenaing of witnesses, York County District Attorney J. Christian Ness proposed a plea bargain for Petitioner. Petitioner authorized her counsel to agree, and counsel and District Attorney did agree, in the presence of the trial judge with concurrence of the Investigating Officer and an Assistant District Attorney, that Petitioner would plead guilty to involuntary manslaughter; Petitioner would testify at the up-coming trial of the co-defendant, Larry Hake; and District Attorney would nolle pros the remaining charges. The District Attorney held off taking the plea, alleging he was tied up on other cases. On August 4, 1982, in reliance on the bargain, Petitioner granted an interview to the District Attorney to review testimony she could offer against co-defendant, Larry Hake. On or about August 9, 1982, the

the District Attorney withdrew his plea bargain and so advised the court on August 19, 1982.

On August 25, 1982, Petitioner objected in her Omnibus Pre-Trial Motion:

> (i) the Defendant has lost irrevocably the right to have self-incriminating statements secured in violation of her constitutional rights suppressed... thereby perpetrating the turbulence in the news media and further eroding the possibilities of the Defendant getting a fair trial anywhere in the Commonwealth of Pennsylvania. (emphasis supplied)

Petitioner raised violations of her 5th, 6th, and 14th Amendment rights as well.

On September 9, 1982, the Court of Common Pleas of York County, Pennsylvania, found that the District Attorney had acted in good faith, and it denied Petitioner's Motion to dismiss the charges. See Appendix E at APP-28 .

After trial, which occurred on November 3-5, 1982, Petitioner objected again in Post-

Trial Motions filed November 10, 1982:

> Did the offer of a plea bargain by the District Attorney to the Appellant, in reliance upon which the Appellant permitted the District Attorney to interview her concerning the facts in her daughter's death, and thereafter the disavowing of the plea bargain by the District Attorney violate the Constitutional rights of the Appellant? (emphasis supplied)

On February 9, 1983, the trial court rejected Petitioner's argument. See Appendix B at APP-22 . On March 11, 1983, judgment of sentence was entered by the Court of Common Pleas of York County, Pennsylvania. See Appendix B at APP-22.

On April 14, 1983, Petitioner appealed to the Superior Court of Pennsylvania. She objected to withdrawal of the plea bargain on constitutional grounds. See Appendix A at APP-2 . (same language as Post-Trial Motion, supra.) On January 23, 1985, the Superior Court rejected the Petitioner's

argument. See Appendix A at APP- 3. On March 28, 1985, the Superior Court denied reargument. See Appendix A at APP-4.

On April 26, 1985, Petitioner petitioned for Allowance of Appeal to the Supreme Court of Pennsylvania, querying:

> Whether the District Attorney's unilateral withdrawal from a plea bargain approximately 24 days after it was made and after detrimental reliance thereon by the Appellant, operated to violate the Appellant's 5th, 6th, and 14th Amendment rights? (emphasis supplied)

On November 12, 1985, the Supreme Court denied Allowance of Appeal. See Appendix C at APP-24.

THE PRE-TRIAL PUBLICITY

After having unilaterally withdrawn from his plea bargain on August 19, 1982, the District Attorney granted interviews

with local press and radio. In these interviews, he disclosed that he had withdrawn from the plea bargain because Petitioner was unable to give him any information which would be of value in securing a first degree murder conviction against Larry Hake, and because Petitioner's testimony was contradicted by "many letters she had written to Hake (which came to my attention (subsequent to talking to her) that were totally different than what they told me they were going to tell me." He further opined that "...she (Petitioner) is still teamed up with Hake" and speculated that Petitioner "wants to get him (Hake) off then get herself off...."

Shortly after the District Attorney's statements made the news, Petitioner's character witnesses began to fall off. Three character witnesses lost faith in Petitioner and would not testify because

of the District Attorney's disclosures. See Appendix F at APP-38 .

On September 9, 1982, Petitioner objected to the District Attorney's conduct in her Pre-Trial Motion:

> Because of the aforesaid conduct, which constitutes over-reaching, prosecutorial misconduct, and various violations of the Defendant's constitutional rights, your Honorable Court is requested to dismiss the complaint and information.... (emphasis supplied)

The constitutional rights invoked were: right to a fair trial (paragraph #25) and right to compulsory process (paragraph #24(g)). On September 9, 1982, after a hearing on the matter, the Court of Common Pleas of York County, Pennsylvania, denied Petitioner's Motion. See Appendix G at APP-40 .

On November 3-5, 1982, the Petitioner stood trial. On November 10, 1982, she filed her Post-Trial Motion asking:

> Did the pre-trial publicity which emanated from statements made by

> the District Attorney constitute a violation of Defendant's Constitutional rights to a fair trial? (emphasis supplied)

On February 9, 1983, the trial court rejected this argument. See Appendix B at APP-22 . On March 11, 1983, the York County Pennsylvania court entered judgment of sentence. See Appendix B at APP-23 .

On April 14, 1983, Petitioner appealed judgment of sentence to the Superior Court of Pennsylvania and raised the same issue. See Appendix A at APP-3 . On January 23, 1985, the Superior Court affirmed judgment. See Appendix A at APP-3 . On March 28, 1985, the Superior Court denied reargument. See Appendix A at APP-4 .

On April 26, 1985, Petitioner applied for Allowance of Appeal to the Supreme Court of Pennsylvania, asking:

> Whether pre-trial publicity instigated by the District Attorney after his breach of the aforesaid plea bargain operated to deny

Appellant a fair trial?

On November 12, 1985, the Supreme Court, the highest reviewing court, refused allocatur. See Appendix C at APP-24 .

THE TRIAL

On the first day of trial, November 3, 1982, the District Attorney announced that he would try the case for the Commonwealth. The same District Attorney had interviewed the Petitioner on August 4, 1982. See The Plea Bargain, supra. The same District Attorney had announced in open court on September 9, 1982, that he had asked Assistant District Attorney Richard Horn to try the case against the Petitioner, apparently to avoid prejudice. See Appendix F at APP-38 .

Petitioner immediately objected in camera:

> I am going to move that the District Attorney of York County not be permitted to personally try this case today, the reason is as follows:... now since we are advised and since it became apparent that Mr. Ness (the District Attorney) felt there was prejudice there, and I have long felt there was prejudice there, we do not believe that Mr. Ness should try this case, with the benefit of personal knowledge and information he received from my client.

Transcript of November 3, 1982, page 3.

The trial judge refused Petitioner's motion. See Appendix H at APP-42 .

On November 10, 1982, Petitioner filed her Post-Trial Motion, asking:

> Did the District Attorney violate the Constitutional rights of the Appellant in representing the Commonwealth in conducting the trial against the defendant? (emphasis supplied)

On February 9, 1983, the trial court dismissed this objection. See Appendix B at APP-22 .

Judgment of Sentence was entered on March 11, 1983. On April 14, 1983,

Petitioner appealed to the Superior Court of Pennsylvania, reiterating the language of her Post-Trial Motion. See Appendix A, APP-2 . On January 23, 1985, the Superior Court affirmed the judgment of sentence. Id., at APP-3 . On March 28, 1985, reargument was denied. See Appendix A at APP-4 .

On April 26, 1985, Petitioner applied for Allowance of Appeal to the highest reviewing authority in the Commonwealth, the Supreme Court of Pennsylvania. Petitioner impliedly raised this issue in her Application at pages 7 and 8:

> 4. She (Petitioner) had been denied the benefit of Miranda warnings prior to the interrogation by the District Attorney in violation of the 5th, 6th, and 14th Amendment rights.

On November 12, 1985, the Supreme Court refused allocatur. See Appendix C at APP-24 .

IX

REASONS FOR GRANTING WRIT

ARGUMENT

1. By deciding that the prison interview, and the introduction of evidence against the Petitioner gained during the interview, did not violate Petitioner's right to counsel, the Superior Court of Pennsylvania contradicted United States Supreme Court decisions.

A majority court in Maine v. Moulton, 54 U.S.L.W. 4039 (1985) summarized your Honorable Court's most recent understanding of the 6th Amendment right to counsel:

> The 6th Amendment guarantees the accused at least after the initiation of formal charges, the right to rely on counsel as a "medium" between him and the State...(T)his guarantee includes the state's affirmative obligation not to act in a manner that circumvents the protection accorded the accused by invoking this right....(Knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a

> breach of the State's obligation ...as is the intentional creation of such an opportunity. Accordingly, the 6th Amendment is violated when the state obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent. (emphasis supplied)

54 U.S.L.W. at 4042.

In the case at hand, Commonwealth initiated formal charges against the Petitioner Jo Ellen D. Bailey. It then knowingly exploited an opportunity to confront her without her counsel being present. Similarly,in United States v. Morrison, 449 U.S. 361, 101 S.Ct. 665 66 L.Ed.2d 264 (1981), cited by the trial court, the State initiated formal charges against the Defendant,then knowingly exploited an opportunity to confront her without counsel being present. However, the Defendant in Morrison told the police nothing, period. The Defendant in the

instant case, Jo Ellen D. Bailey, told the police that she was corresponding with the man who allegedly beat her child to death. She also told police who her girlfriends were in York County Prison.

In Morrison, your Honorable Court affirmed conviction because the Defendant said nothing and could show no resulting prejudice.

In the instant case, your Honorable Court should grant certiorari because Petitioner made statements to the police which were used against her at trial:

> DISTRICT ATTORNEY: How could you write the man love letters after hearing that, at the preliminary hearing, that he did what you are telling us he did? (murdered her child)

Transcript of November 5, 1982, p. 327. The District Attorney also called one of Petitioner's prison girlfriends, Betty Burhans, who had intercepted Petitioner's letters. The District Attorney read parts of one letter in court. See Appendix I at APP-45 .

In Maine v. Moulton, supra. and its antecedents, United States v. Massiah, 377 U.S. 201, 84 S. Ct. 1199, 12 L.Ed.2d 246 (1964) and United States v. Henry, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980), the State gathered evidence by subterfuge (electronic surveillance, secret agent) after indictment, and used it to convict the defendant. In the instant case, the State also gathered evidence by subterfuge, after indictment, and used it to convict the Petitioner.

The Commonwealth may argue that in Massiah, Henry, and Moulton, there was no other way for the State to get the evidence, whereas in the instant case, the State would have inevitably discovered the letters and Betty Burhans. The Petitioner argues, however, that the record is bare of any evidence to prove this. The record shows no search underway for Petitioner's letters or friends before her interview with Officer Garber at the prison. Hence, the instant case is not the same as Nix v. Williams, 52 U.S.L.W. 4732 (1984), where the search party would have inevitably discovered the dead body, without the illegal questioning.

If your Honorable Court finds that the instant case falls in a gap between Massiah, Henry, and Moulton (no other way

to discover evidence) and Nix (inevitable discovery), then Petitioner submits that her case presents an important question of federal law which should be ruled upon by Your Honorable Court.

2. The instant case conflicts with the Court of Appeals of Maryland and the Fifth Circuit Court of Appeals, which forbid a prosecutor to withdraw a plea agreement after the defendant detrimentally relies upon it.

The instant case nearly recites the facts of State v. Brockman, 277 Md. 687, 357 A.2d 376 (1976). In Brockman, State withdrew a plea bargain apparently because it no longer needed defendant's testimony in the case against a co-defendant, and because it felt that a hesitancy by the defendant in the course of giving his sworn deposition constituted a breach on the defendant's part.

In the instant case, Commonwealth withdrew a plea bargain because it felt Defendant's testimony in the case against a co-defendant was worthless, and because it felt Defendant's testimony was contradicted by other evidence.

In both Brockman and the instant case, Prosecutor withdrew his plea bargain before taking defendant's guilty plea.

In Brockman, the Maryland high court held that the District Attorney could not withdraw the agreement because of the way the defendant behaved at deposition, or because the State no longer needed his testimony. In the instant case, the Court of Pennsylvania allowed Commonwealth to withdraw the agreement if it could not use the evidence. Thus, the Superior Court of Pennsylvania conflicts with the Court of Appeals of Maryland on this issue.

See also United States v. Rodman, 519 F.2d 1058 (5th Cir. 1975).

Commonwealth may cite Mabry v. Johnson, ___U.S.___, 104 S.Ct. ___, 81 L.Ed.2d 437 (1984), in which your Honorable Court held that a criminal defendant's acceptance of a proposed plea bargain does not create a constitutional right to have the bargain specifically enforced. However, the defendant in Mabry merely telephoned the Prosecutor to accept the bargain and was told that the bargain was withdrawn, before detrimental reliance. Jo Ellen D. Bailey detrimentally relied on the proposed plea bargain; she released witnesses under subpoena; told character witnesses of her agreement to plead manslaughter; and granted an interview with the District Attorney. Thereafter, the District Attorney withdrew his plea bargain.

Petitioner also points to dicta from the West Virginia Supreme Court of Appeals. In Gray v. McLure, 242 S.E.2d 704 (1978) the West Virginia Court said prosecutors pledge the public faith, and that this pledge must be honored once the defendant pleads guilty or "otherwise act(s) in substantial detriment in reliance thereon." See also 16 A.L.R. 4th 109 for an annotation of this subject.

Hence, the instant decision conflicts with the high court of Maryland, with dicta from West Virginia, and with the Fifth Circuit.

3. Whether Prosecutor infringed Petitioner's due process rights under the U.S. Constitution by making statements to the media which caused Petitioner to lose character witnesses presents an

important question of federal law which your Honorable Court should settle.

Petitioner has discovered a multitude of cases discussing prosecutor's pre-trial publicity and its effect on actual or potential jurors; motions for continuance; motions for change of venue. See 22 A.L.R. Fed. 556. Petitioner has discovered no cases discussing prosecutor pre-trial publicity and its effect on character witnesses.

The Code of Professional Responsibility DR 7-107, 42 Pa. C.S.A. (Purdon 1975), forbids a prosecutor, after indictment, from disseminating any opinion as to guilt or innocence of the accused, or the character of the accused. In the instant case, the Prosecutor publicly speculated about Jo Ellen D. Bailey's guilt and character. His comments about her letters

to co-defendant, Hake, rose to the level of prejudice per se because he, in effect, publicized a confession of guilt, expressly forbidden by DR 7-107(c)(7).

While a violation of the Disciplinary Rules does not constitute a per se deprivation of due process, Commonwealth v. Scarpino, 494 Pa. 421, 431 A.2d 926 (1981), your Honorable Court is requested to review the conduct of the prosecutors who caused petitioners to lose substantial evidence in their zeal for prosecution. See Hanney v. Commonwealth, 116 Pa. 322, 9 Atl. 339 (1887) (character evidence is substantive evidence which can serve to acquit in Pennsylvania).

4. Whether District Attorney deprived Petitioner of right to counsel by offering her plea bargain, interviewing her, then withdrawing plea bargain and trying her,

presents an important question of federal law which your Honorable Court should settle.

Petitioner discovered no state, federal, or Supreme Court cases on this precise point. However, the Ninth Circuit recognized that prosecutors who illegally acquire information against a criminal defendant should "insulate" themselves from such information. United States v. Bagley, 641 F.2d 1235 (9th Cir. 1981).

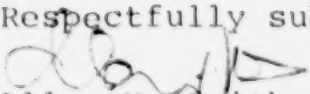
In Bagley, informant shared defendant's cell and reported to police. The 9th Circuit affirmed his conviction because prosecution learned nothing new from informant; and prosecutors insulated themselves from any information informant may have given to the federal agents who debriefed him. Prosecution thus avoided

the appearance of impropirety.

CONCLUSION

The instant case conflicts with Bagley at every point, and although Bagley arose out of a different set of facts (secret agent), the thrust of Bagley, as of Massiah, Henry, and Moulton, supra. is that states should respect the integrity of the attorney-client relationship and should not strip criminal defendants bare of their constitutional rights. Accordingly, certiorari should be granted to review the prosecution and conviction of Jo Ellen D. Bailey.

Respectfully submitted,



Allen H. Smith,
Atty. for Petitioner

APPENDIX A

IN THE SUPERIOR COURT OF PENNSYLVANIA

COMMONWEALTH OF PA. : NO. 988 Phila. 1983

VS

JO ELLEN D. BAILEY,
APPELLANT

APPEAL FROM THE JUDGMENT OF SENTENCE ENTERED MARCH 11, 1983, COURT OF COMMON PLEAS, WAYNE COUNTY, CRIMINAL DIVISION, AT NO. 412-B CRIMINAL ACTION 1982, 114-1982 VENUE CHANGE

BEFORE: CAVANAUGH, CIRILLO AND JOHNSON, JJ.

MEMORANDUM:

Appellant, Jo Ellen D. Bailey, takes this appeal from her conviction on the charge of murder in the third degree following the death of her five year old daughter as a result of a severe beating. In this appeal, Appellant raises twenty-four issues which are, as stated by appellant:

****

2. Did the pre-trial publicity which emanated from statements made by the District Attorney constitute a violation of Defendant's constitutional rights to a fair trial? (Id. at II).

3. Did the offer of a plea bargain by the District Attorney to the Appellant, in reliance upon which the Appellant permitted the District Attorney to interview her concerning the facts involved in her daughter's death, and thereafter the disavowal of the plea bargain by the District Attorney violate the Constitutional rights of the Appellant? (Id. at III, IV).

4. Did the District Attorney violate the Constitutional Rights of the Appellant in representing the Commonwealth in conducting the trial against the Defendant? (Id. at IV).

5. Did the District Attorney err in not advising counsel for the Defendant (Appellant) until the day of trial that he, the District

Attorney, was going to try the case for the Commonwealth? (Id. at IV).

****

18. Did the Commonwealth violate the Constitutional rights of the Defendant/Appellant when Officer Garber, with the permission and consent of the District Attorney, interviewed the Defendant/Appellant at the York County Prison? (Id. at XIII).

We find issues number one through twenty-three to be, for the most part, adequately addressed in the opinion, dated February 9, 1983, of the trial judge, the Honorable Emanuel A. Cassimatis, and we hereby affirm on that basis.

Affirmed.

BEFORE: CAVANAUGH, CIRILLO AND JOHNSON, JJ.

PER CURIAM: Judgment of sentence affirmed

FILED: JANUARY 23, 1985

IN THE SUPERIOR COURT OF PENNSYLVANIA
SITTING AT PHILADELPHIA

MARCH 28, 1985

ALLEN H. SMITH, ESQ.
47 NORTH DUKE STREET
YORK, PA. 17401

RE: Commonwealth v. Jo Ellen D. Bailey,

Appellant, No. 988 Philadelphia 1983

(J-68021/1984)

Dear Mr. Smith:

This is to advise that the following Order has been entered in the above-captioned matter:

"AND NOW, March 28, 1985, appellant's application for reargument is denied.

s/ Per Curiam"

Very truly yours,

J. Haniel Henry
Prothonotary

JHH/lj
cc:

APPENDIX B

IN THE COURT OF COMMON PLEAS OF YORK COUNTY
PENNSYLVANIA

COMMONWEALTH OF PA. : 4123 C.A. 1982

VS : CRIMINAL HOMICIDE

JO ELLEN D. BAILEY

APPEARANCES: J. CHRISTIAN NESS, ESQ.,
DISTRICT ATTORNEY FOR
THE COMMONWEALTH

ALLEN H. SMITH, ESQ.,
FOR THE DEFENDANT

OPINION

This matter is before the Court on the post-verdict motions for a new trial and in arrest of judgment of the Defendant, Jo Ellen Bailey. The District Attorney of York County charged, by information, that on February 18, 1982, the Defendant, Jo Ellen Bailey, along with Larry Hake, did knowingly, intentionally, deliberately and with malice aforethought and premeditation kill and murder Aleta V.

Bailey, the five-year old daughter of Defendant, Jo Ellen Bailey. The Information specified the offense charged as follows: criminal homicide, murder, voluntary manslaughter and involuntary manslaughter, as enumerated in Sections 2501-2504 of the Pa. Crimes Code, 18 C.P.S.A. §2501-4. A trial in this matter began on November 3, 1982, in Homesdale, Wayne County, PA. The jury found the Defendant, Jo Ellen Bailey guilty of murder in the third degree. We have heard the arguments and reviewed the briefs in support and in opposition to the Defendant's post-verdict motions and will dismiss the motions for a new trial and arrest of judgment.

II

The Defendant argues that the pre-trial publicity of District Attorney Ness concerning letters of the Defendant, Jo Ellen Bailey to

co-defendant, Larry Hake, caused the Defendant to lose a number of character witnesses. The Defendant characterizes this publicity as "reckless, wanton, extra-judicial statements by the District Attorney" and alleges that they violated the Constitutional rights of the Defendant by depriving her of witnesses and a fair trial. Defendant does not mention any specific statements. Reported in the transcript of the hearing before Judge Buckingham on September 9, 1982, at page 45 is the following:

> "Mr. Smith: We are going to show that Caroline Jacobs would have been a character witness for Jo Ellen Bailey if the trial had been held on July 19, 1982. Because of the way the case has turned, information about letters to Larry Hake, to team up with Larry Hake, that kind of thing, she no longer will be a character witness for her.
>
> Mr. Ness: If she is not going to be a character witness, I will stipulate to that.
>
> Mr. Smith: Also, Linda Seitz and Betty Altland.

> Mr. Ness: Mr. Smith says that is what they are (sic) going to say, that they don't want to testify and that they would have testified previously. I agree to that."

The Defendant cites U.S. v. Armijo-Martinez, 669 F.2d 1131 (6th Cir. 1982) as support for its position that the actions of the District Attorney deprived the Defendant of her Constitutional rights. The first sentence of the Court's opinion, per Lively, J., states: "This appeal concerns the compulsory process guarantee of the Sixth Amendment." The decision in Armijo-Martinez is one of a long line of decisions beginning with U.S. v. Mendez Rodriquez, 450 F.2d 1 (9th Cir. 1971) and concerns action of the government which results in the denial of access to witnesses who might conceivably aid the defense. The decision in Armijo-Martinez states the "essential elements" to find a violation of the compulsory process

guarantees: "(1) unilateral Government action denying a defendant access to a witness; and (2) prejudice, i.e. loss of a conceivable benefit to the defendant from the missing witness's testimony." U.S. v. Armijo-Martinez 669 F.2d at 1135-36. In Armijo-Martinez, the unilateral Government action consisted of offering fourteen potential witnesses "voluntary" departure," and paying the expense of transporting the fourteen Mexicans to El Paso, Texas, so that they could cross the border into Mexico. In the present case, District Attorney Ness did not deny defense counsel access to the three witnesses named. All three remained accessible. Their willingness to testify on behalf of the Defendant Jo Ellen Bailey may or may not have resulted from any pre-trial publicity. The Defendant has not shown a sufficient cause-and-effect relationship to enable this Court to apply the

principles of Armijo-Martinez to a case of indirect, nonphysical action that the District Attorney allegedly made. Therefore, we reject this argument in support of the Defendant's post-verdict motions in arrest of judgment and for a new trial.

III

The Defendant Jo Ellen Bailey argues that the District Attorney engaged in misconduct motivated by "sinister ends" and, thereby, violated the Defendant's Constitutional rights. Specifically, the Defendant argues that the District Attorney offered the Defendant a plea bargain, namely, if she testified for the Commonwealth in the matter of Commonwealth v. Larry Hake, the District Attorney would accept the Defendant Jo Ellen Bailey's plea of guilty of involuntary manslaughter. The Defendant argues that it relied on the plea bargain to permit the District Attorney to interview Defendant in the office of her

counsel, Allen Smith, Esquire. The Defendant argues that the District Attorney obtained information which, after the District Attorney disavowed the plea bargain, was alleged used against the Defendant at trial.

Prosecutorial misconduct can be grounds for the dismissal of an indictment. U.S. v. Grubb, 513 F. Supp. 745 (E.D. Pa. 1981). There are two classes of cases in which the Courts have exercised their supervisory powers to dismiss an indictment on the grounds of prosecutorial misconduct. We shall apply these as guidelines to decide the Defendant Jo Ellen Bailey's motions. We note preliminarily, however, that dismissal of an indictment on the ground of prosecutorial misconduct has a more direct cause-and-effect relationship than does any alleged prosecutorial misconduct to the motions presented by the Defendant Jo Ellen Bailey. This distinction is borne out in the explanation of the two classes of cases.

First, a Court may dismiss an indictment and, to extend the argument, may grant defendant's post-verdict motions in arrest of judgment and for a new trial, where the defendant can show the prosecutorial misconduct has caused the defendant "actual prejudice". U.S. v. Grubb, 513 F. Supp. at 747. No actual prejudice was suffered by Defendant Jo Ellen Bailey from her interview with the District Attorney. The District Attorney used none of the information which was gained from the interview at trial. Indeed, the Defendant's testimony at trial was so different from the information related at the interview that while the District Attorney could have cross-examined the Defendant on this inconsistency, he made no reference during the trial to any information gained at the interview.

Second, a Court may dismiss an indictment "even where no actual prejudice has been shown,

if there is evidence that the challenged activity was something other than in isolated incident unmotivated by (sinister) ends, or that the type of misconduct challenged has become 'entrenched and flagrant' in the circuit". U.S. v. Grubb, 513 F. Supp. at 747, (citations omitted). This extraordinary supervisory power of the Court was set forth in a "prophylactic rule of dismissal" which might be appropriate in certain cases. The federal court of appeal explained its reasoning in support of this prophylatic rule:

> "in doing so, we note that the federal courts have an institutional interest, independent of the concern for the rights of the particular defendant in preserving and protecting the appearance and the reality of fair practice before a grand jury, an interest which could justify the imposition of a prophylactic rule in a proper case. But in absence of any showing that the conduct... (of the attorney) added substantive matters or was anything but an isolated incident unmotivated by sinister ends or alternatively, that the practice of prosecutorial testimony was 'entrenched and flagrant' we refuse to exercise that power."

U.S. v. Birdman, 602 F.2d 547, 559 (3d Cir. 1979). This principle does not extend to support Defendant Jo Ellen Bailey's post-verdict motions.

The reasoning proffered by the third circuit court of appeals belies the application of this "prophylactic rule" to the present case. In this action, the alleged prosecutorial misconduct was not testimony before a grand jury and cannot be regarded as adding substantive matter to the case against Defendant Jo Ellen Bailey. To regard the conduct of District Attorney Ness as "anything but an isolated incident unmotivated by sinister ends" stretches the imagination. There is no contention that the practice of prosecutorial testimony is "entrenched and flagrant". The purpose of the rule is to preserve and protect the appearance and reality of fair practice before a grand jury.

The conduct alleged is not testimony before a grand jury. Therefore, we reject this argument in support of the Defendant's post-verdict motions.

IV.

The Defendant Jo Ellen Bailey argues that the District Attorney erred in representing the Commonwealth at the trial of Defendant and that he erred in not advising defense counsel of his intent to so try the case until the day of the trial. The Defendant further argues that this Court erred in not continuing the trial of Defendant when it was notified that Defendant filed a petition to appoint an out-of-county prosecutor with the Supreme Court of Pennsylvania. Finally, in this regard, the Defendant argues that this Court erred when it failed to direct the Assistant District Attorney to try the case against Defendant Jo Ellen Bailey. The Defendant supports these arguments against District Attorney Ness's representation

of the Commonwealth alleging that the District Attorney used information given by the Defendant Jo Ellen Bailey in reliance on a proffered plea bargain that was subsequently withdrawn, that receipt of this information caused the District Attorney to inform defense counsel that he would not try the case, and that the District Attorney's representation of the Commonwealth at the trial of Defendant Jo Ellen Bailey violated the Constitutional rights of the Defendant.

It is the policy of District Attorney J. Christian Ness to personally assume trial responsibility for all cases involving homicide. Consistent with this policy, Distrist Attorney Ness prosecuted the case against Defendant Jo Ellen Bailey from its inception. He attended the preliminary hearing on March 1, 1982, before District Justice Stambaugh. District Attorney Ness continued to prosecute the case throughout

the summer of 1982. On August 4, 1982, the District Attorney interviewed Defendant Jo Ellen Bailey in the office of and in the presence of her defense counsel, Allen Smith, Esquire. At the hearing before Judge Buckingham on September 9, 1982, the District Attorney was questioned by Assistant District Attorney Kearney concerning the interview. The District Attorney responded stating: "I not only haven't gained any information but as a result of this, I have asked Attorney Horn to try the case" (transcript of Sept. 9, 1982, p. 66). Further, on in the hearing was this colloquy concerning the interviews with Defendant Jo Ellen Bailey:

> "Mr. Ness:....What I did is heard it, discounted it as being totally worthless and have not to any degree used it in this case, and the record of the Hake trial shows it.
>
> Mr. Kearney: I take it you do not intend to use that in the trial of Jo Ellen Bailey either?
>
> Mr. Ness: Well, no. I could hardly

> use it because she said she didn't see anything. I am not going to admit a statement that is totally exculpatory. That would be Mr. Smith's job."

(Testimony of Mr. Ness at hearing before Buckingham, J. on September 9, 1982, pg. 66) Subsequent to this hearing, Assistant District Attorney Horn began to work on the Commonwealth's case against Defendant Jo Ellen Bailey. The District Attorney never withdrew his appearance from the case, nor did Assistant District Attorney Horn assume full responsibility in this case. Whether the District Attorney did or did not intend to use any of the information gained at the interview of Defendant Jo Ellen Bailey at her trial cannot be determined. It remains that the District Attorney now argues that he did not use any of that information at trial, that the record bears him out, and we can infer that such was his intention from the start. This Court cannot dispute

the position of the District Attorney or find that his conduct at the interview in the presence of defense counsel at the hearing before Judge Buckingham and at the trial violated the Defendant's Constitutional rights. It is significant that the continued appearance of District Attorney Ness as counsel for the Commonwealth did not deprive the Defendant of the opportunity to petition the Supreme Court to bar the District Attorney from trying the case.

This Court refused to continue the trial of Defendant Jo Ellen Bailey pending the decision of the Supreme Court of PA. on the petition of Defendant to appoint an out-of-county prosecutor, a petition which did not request a stay of proceedings or contain a suggested order. This Court also permitted the District Attorney to remain as counsel for the Commonwealth and refused to appoint the Assistant District Attorney in his stead.

After the trial, the Supreme Court of PA. dismissed the Defendant's petition in these regards. Therefore, in the absence of any proven impermissable prejudice against the Defendant, we reject this argument in support of the Defendant's post-verdict motions. The only "prejudice" we perceive is that experienced and well prepared counsel tried the case on behalf of the Commonwealth. This is not to imply that an Assistant District Attorney would not have served as well. We do not regard District Attorney Ness's statement in the hearing before Judge Buckingham on September 9, 1982, that he would assign Assistant District Attorney Horn to try this case as preventing him from continuing to proceed as trial counsel in behalf of the Commonwealth.

XIII

The Defendant Jo Ellen Bailey argues that

the Commonwealth violated the Constitutional rights of the Defendant when Officer Garber interviewed the Defendant at the York County Prison without the presence of defense counsel. The Court, per Miller, J., listened to the testimony of Officer Garber concerning his interview of the Defendant, entertained questions of defense counsel, Allen Smith, Esquire, on the substance of the interview and stated:

> "The testimony was, Mr. Smith, that nothing was obtained from the interview which could be used in the prosecution of the case, and in the absence of any indication that there was or the nature of it, we simply can't make any Order of that kind and I decline to do so."

Transcript of hearing before Miller, J., on May 6, 1982, pages 42 and 43. In an Order issued that same day, the Court, per Miller, J., refused the Defendant's motion to quash stating: "...we are satisfied that no prejudice has occurred of the kind that would justify the dismissal of the criminal charges and we,

therefore, deny the Defendant's motion to dismiss the Criminal Complaint and Information. See U.S. v. Morrison, 449 U.S. 361, 101 S.Ct. 665, 66 L.Ed.2d 564 (1981)

We approve and adopt this Court's previous Opinion and now reject the Defendant's argument in support of the post-verdict motions

In summary, we have reviewed the thirty-three arguments of the Defendant Jo Ellen Bailey in support of the post-verdict motions in arrest of judgment and for a new trial and dismiss these motions.

Accordingly, we shall enter the following Order.

BY THE COURT:

DATED: Feb. 9, 1983 Emanuel Cassimatis J.

ORDER

AND NOW, TO WIT: this 9th day of February, 1983, it is ordered and directed that the Motions for a new trial and in arrest of

judgment of the Defendant Jo Ellen Bailey are refused and dismissed. The Defendant Jo Ellen Bailey is ordered to appear before this Court for sentencing on March 11, 1983 at 9:30 a.m. The Probation Department is directed to provide a pre-sentence investigation report. The Clerk of Courts is directed to provide notice of the entry of this Opinion and Order as required by law.

BY THE COURT,

EMANUEL CASSIMATIS
J.

APPENDIX C

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

November 13, 1985

ALLEN H. SMITH, ESQ.
47 NORTH DUKE STREET
YORK, PA. 17401

RE: Commonwealth of Pennsylvania v. Jo Ellen D. Bailey No. 501 E.D. Allocatur Docket 1985

Dear Mr. Smith:

This is to advise you that the following Order has been endorsed on your Petition for Allowance of Appeal, filed in the above captioned matter:

"November 12, 1985.

Petition Denied.

Per Curiam."

Very truly yours,
Patrick Tassos
Deputy Prothonotary

/aw
cc:

APPENDIX D

THE COURT: Very well. There is no question that Officer Garber interviewed the Defendant at the York County Jail on the 21st of April, 1982, and that this interview was done in the absence of counsel. We do not suggest that this practice is appropriate, however, the relief the Defendant has asked is most extraordinary, that is that the criminal complaint and information be dismissed.

It is clear from the testimony that Officer Garber did advise the Defendant that if she talked about the case on which she was incarcerated, he would first have to advise her of her Constitutional rights. It is clear that she told the officer that she did not want to talk to him about the case; and it is clear that no incriminating statements were made by the Defendant to the Officer.

Under the circumstances, we are satisfied that no prejudice has occurred of the kind that would justify the dismissal of the Criminal charges and we, therefore, deny the Defendant's motion to Dismiss the criminal Complaint and Information.

I believe that there is also a motion to suppress which has been filed and which has been consolidated with this proceeding. We note that both the Defendant and Officer Garber testified that nothing incriminating was said; however, for the record, we direct that to the extent that any incriminating statements made by the Defendant at that interview did occur, they shall be suppressed and may not be used in evidence in any trial where she is the Defendant. I believe that will take care of the situation.

MR. SMITH: What about the using of the information to further the investigation of

this case; information that was obtained as a result of the April 21, 1982 interrogation?

THE COURT: The testimony was, Mr. Smith, that nothing was obtained from that interview which could be used in the prosecution of the case, and in the absence of any indication that there was or the nature of it, we simply can't made any Order of that kind and I decline to do so.

***

(Whereupon, the hearing held in the aforementioned matter was concluded.)

APPENDIX E

IN THE COURT OF COMMON PLEAS OF YORK COUNTY
PENNSYLVANIA

COMMONWEALTH : NO. 412B CA 1982

VS

JO ELLEN D. BAILEY

YORK, PA., THURSDAY, SEPTEMBER 9, 1982
BEFORE HONORABLE JAMES E. BUCKINGHAM, JUDGE

APPEARANCES: J. Christian Ness, Esq.
District Attorney
Thomas Kearney, Esq.
For the Commonwealth

Allen H. Smith, Esq.
Marc Roberts, Esq.
For the Defendant

***

This matter is before the Court on omnibus pre-trial motions filed by the defendant. We have taken testimony on the issues and made the following findings of fact and conclusions of law and will enter the following order:

The next question that we are going to discuss is the motion of the defendant to dismiss the complaint and the information against the defendant's observation, that the district attorney, Mr. Ness, deliberately and intentionally entered into a scheme whereby a plea bargain was made with the defendant and her counsel with no intention of consummating the plea bargain. We find as a fact that that never happened. We find, of course, as a fact that the plea bargain was entered into by the parties concerned, but we find as a fact that the district attorney entered into it in complete good faith and had every intention of consummating the plea bargain in due course. Now it is true that he took off entering the plea right away, but we find that he had good reason for it. We find that he was tied up in other cases and the trial of the other co-defendant, Mr. Hake, had not started, and so we find that he made a justifiable and reasonable decision

in not taking the plea right away. We also find as a fact that subsequent to the plea bargain and subsequent to the interview which the defendant and her counsel had with the district attorney, we find as a fact that the so-called statement prepared by Mr. Smith for the defendant and prepared by him with the aid of the defendant is exculpatory and not inculpatory in any sense of the word. The important thing that we find is that even assuming that the defendant said, and we find that she would have testified against the defendant, we find as a fact that she did write some letters to her co-defendant, Mr. Hake, clearly indicating that she would help him rather than hinder him at Mr. Hake's trial. Not only that, and that is good enough reason for the district attorney for rejecting the plea bargain because as it turns out the defendant here would have been no help whatsoever to the Commonwealth. Another reason

that he rejected the plea bargain, and we find this very pursuasive and very justifiable and reasonable on his part, is that the defendant told the district attorney that she saw no bruises on this child except maybe a cut on the finger. While the picture was not actually put into evidence in this case, we saw it and it is obvious to this Court that anyone would have seen bruises on that child's face. You could not possibly have missed it. For her to say that she did not see anything just stretches credulity. It is a small wonder that the district attorney dediced that she would have no credibility in this case. We agree with him that it would have been nonsense to call this lady as a witness as part of the Commonwealth in view of the documentary in pictorial evidence as this child's condiction. The other reason the district attorney rejected the case is because he got the impression overall that

the defendant instead of trying to help the Commonwealth would have been trying to help the defendant, Mr. Hake. Althouth the letters are not put into evidence, it is crystal clear and it is not denied by this defendant that she did write the defendant letters. The letters indicate that she wanted to get together with him afterwards. The whole tenor of the letters was to be one of help to the defendant, not of hinderance. We find as a fact, and we really have no alternative, that the district attorney was fully justified in rejecting the plea bargain and that in good faith he rejected it, not with any prior plan but after reviewing the facts in the case, deciding that, and we concur in his decision that the defendant Jo Ellen Bailey, would have hurt the Commonwealth's case rather than helped it. With respect to what Mr. Smith told the district attorney as to how effective the defendant here would be in testifying against Mr. Hake, we do

not make judgment on that. There is no question about it, it appears from the testimony before us that Mr. Smith was confident that and I believe in good faith that Mrs. Bailey would have been of help to the Commonwealth in the Hake case. It is clear to this court as it turns out that she would not have been of any help whatsoever. In fact, it would have been a hinderance to the Commonwealth's case if she had been called to testify. For that reason as we have indicated, we find that the district attorney, Mr. Ness, entered into the plea bargain in good faith, that he ultimately after a proper investigation rejected the plea bargain in good faith and notified the defendant and her counsel promptly. In doing so, he did not violate his office or any duties as district attorney or as an officer in this court, and an attorney at this Bar. We finally come to the question of Rule 1100. The defendant has

asked the court to discharge her on the ground that the Commonwealth has not acted with diligence under the Pennsylvania Rule of Criminal Procedure 1100. We find to the contrary as we have indicated. We find that the Commonwealth did act with due diligence. We find that the Commonwealth through the district attorney did act in good faith. We find that when this defendant went before Judge Cassimatis and requested a continuance, she waived her rights under Rule 1100 and that all this was in good faith on the part of the Commonwealth and on the part of the defendant. The defendant says now, and we believe her, that she would not have entered into a continuance if she had known that the plea bargain would have been rejected, but that is not grounds for being discharged under Rule 1100. If everyone acted in good faith in requesting a continuance, the mere fact that the plea bargain is subsequently

rejected, if it is rejected in good faith as we have so found, we find as a fact in conclusion as a matter of law that the defendant cannot take advantage of that and now come in and say that she should be discharged on Rule 1100. We find that at the time between the conversations concerning the plea bargain and time that it was actually entered into by the district attorney's office, runs against the defendant not the Commonwealth. It is obvious that while the 180 days have passed, that time counts. The calendar days have passed. They are not accountable for 1100 purposes. We find that the defendant's trial will be held within the 180 day period as prescribed by the Pa. Rule of Criminal Procedure 1100. We have already made an order on the discovery, and we hope that both sides will cooperate in that matter. If there is any problem in that area, both counsel should contact the court. With respect

to the Bill of Particulars, we find as a fact the issue of the Bill of Particulars was brought before Judge Miller in an appropriate proceeding. Judge Miller made a decision on that. We, therefore, cannot take any action in that regard. If the Bill of Particulars order that Judge Miller issued or formally or informally that that matter was violated, that matter should go back before Judge Miller. We do agree with the Commonwealth that much of the information requested by Mr. Smith in that Bill of Particulars was not available to him under the rules. He is asking for theories of the case. The Commonwealth is not responsible or bound to give the defendant theories of the case. They are bound to give facts, not the theories. We enter this order:

That the defendant's petition, motion to have her discuarged either under PA. Rule 1100 or under any other rule of procedure of the

Supreme Court or under any other authority, is overruled and dismissed.

APPENDIX F

A: I not only haven't gained any information but as a result of this, I have asked Attorney Horn to try the case. And I never revealed to Mr. Horn or my office the information that she gave me. Now, he knows generally that I didn't think it was helpful. I have never shown either him or any other person the piece of paper that Mr. Smith gave me and never discussed the details of the interview. Not only that, in the Hake trial so that Mr. Hake would not be prejudiced. I did not refer to the things she said, such as taping of the mouth, falling off the bookshelf, so that Mr. Evanick would have no complaint that somehow I got information in an improper fashion. What I did is heard it, discounted it as being totally worthless and have not to any degree

used it in this case, and the record of the Hake trial shows it. We never brought it up, never asked Mr. Hake about it.

Q: I take it you dod not intend to use that in the trial of Jo Ellen Bailey either?

A: Well, no. I could hardly use it because she said she didn't see anything. I am not going to admit a statement that it totally exculpatory. That would be Mr. Smith's job.

APPENDIX G

CAROLINE JACOBS, called as a witness, being sworn, testified as follows:

MR. NESS: Your Honor, I would like an offer of proof.

MR. SMITH: We are going to show that Caroline Jacobs would have been a character witness for Jo Ellen Bailey if the trial had been held on July 19, 1982. Because of the way the case has turned, information about letters to Larry Hake, to team up with Larry Hake, that kind of thing, that she no longer will be a character witness for her.

MR. NESS: If she is not going to be a character witness, I will stipulate that.

MR. SMITH: She would have been a character witness back on July 19, 1982, but because of the progress of the case since that time, she refuses to be a character witness.

MR. NESS: All right. I don't care. You may step down.

MR. SMITH: Also, Linda Seitz and Betty Altland.

MR. NESS: Mr. Smith says that is what they are going to say, that they don't want to testify, and that they would have testified previously, I agree to that.

APPENDIX H

MR. SMITH: I am going to move that the District Attorney of York County not be permitted to personally try this case today, and the reason is as follows:

On September 9, 1982, we had a hearing before Judge Buckingham. At that time a number of things were called to the attention of the Court. Prior to September 9, 1982, there had been an arrangement between Mr. Ness and myself wherein the defendant, Jo Ellen Bailey, would enter a plea to Involuntary Manslaughter and testify against Larry Hake. After that agreement was reached, Mr. Ness came to my office and interviewed my client for approximately one hour, at which time she answered all the questions that Mr. Ness asked of her. Mr. Ness was also given a brief summary statement of some details concerning the alleged involvement of Mr. Hake with this

offense. We felt that the plea bargaining entered into was thereafter rejected by the District Attorney after he interviewed my client and received this other data. Now, at the hearing before Judge Buckingham, Mr. Ness, on page 66 of that transcript, indicated that he has asked Attorney Horn to try the case, and he has indicated, "I have never revealed to Mr. Horn of my office information that she gave me." He has indicated he never showed Mr. Horn any papers that I gave Mr. Ness, nor discussed the details of the interview. The reason that Mr. Ness says he did not tell Mr. Horn anything about this case was so that at the Hake trial, Mr. Hake would not be prejudiced. Of course, the element of prejudice is twice as important in the Bailey trial since she is the one who had the personal conversation with Mr. Ness. Now, since we were advised and since it became apparent that Mr. Ness

felt there was prejudice there, and I have long felt there was prejudice there, we do not believe that Mr. Ness should try this case, with the benefit of personal knowledge and information he received from my client. This presupposes that Mr. Ness did not tell Mr. Horn anything about the interview he had in my office. I don't know. I am presupposing that situation.

THE COURT: Anything else?

We will refuse defense motion to remove Mr. Ness from trial counsel for the Commonwealth.

APPENDIX I

Q: So, you wrote him things like this: "You are so sweet. God, how I love you! I do too look forward to a future with you and hope you don't change your mind over the years."

A: Yes.

Q: And you said, "I am beside you, Larry, no matter what happens", because you were afraid he would get you?

A: Yes.

Q: Didn't you also write to him as follows: "Used to love to tease you with my hot little tongue until you could't stand it anymore." Did you write him that?

A: Yes.

Q: "Sometimes I used to trace around your thighs, belly, balls, anywhere but your cock; loved to make you wait, you would be so big

and hard when I finally took you in my mouth. It sure didn't take long to get what I wanted, did it?" You wrote that because you were afraid of him?

A: Yes.

Q: And, "I loved it too when you watched; sometimes our eyes would lock; I'd get the biggest head rush and come all at once; couldn't help it--so good. I'm eating ice as I write this, but it's not helping the fire I feel blazing away in my puss. I'm so wet. That little present I have for you should be soaked by now. Of course, where else did you expect it to soak?" You wrote that and did that because you were afraid of him?

A: I don't believe I mailed that letter. I wrote those things.

Q: It was not your intent to mail this letter?

A: No.

Supreme Court, U.S.
FILED
APR 16 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1285

IN THE

Supreme Court of the United States

October Term, 1985

JO ELLEN D. BAILEY,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

H. STANLEY REBERT*
District Attorney
York County Court House
28 East Market Street
York, Pennsylvania 17401
(717) 771-9600
Attorney for Respondent

**Counsel of Record*

Batavia Times Publishing Co.
Edward W. Shannon
Philadelphia, Pa. (215) 232-8181

Counterstatement of Questions Presented for Review

A. Was the Defendant's Sixth Amendment right to counsel violated to the extent that a dismissal of the charges was warranted when Officer Garber spoke to her at the York County Prison in the absence of counsel?

Answered in the negative by the Court of Common Pleas, Superior Court of Pennsylvania and Supreme Court of Pennsylvania.

B. Was the Commonwealth entitled to withdraw from a proposed plea bargain?

Answered in the affirmative by the Court of Common Pleas, Superior Court of Pennsylvania and Supreme Court of Pennsylvania.

C. Did the pretrial publicity emanating from statements of the District Attorney deny the Defendant due process of law?

Answered in the negative by the Court of Common Pleas, Superior Court of Pennsylvania and Supreme Court of Pennsylvania.

D. Did the District Attorney deny the Defendant due process of law by trying the case after having earlier announced that he was appointing an Assistant District Attorney to try the case?

Answered in the negative by the Court of Common Pleas, Superior Court of Pennsylvania and Supreme Court of Pennsylvania.

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IN THE

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Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

Counterstatement of the Case

The criminal charges against the Defendant arose out of the beating death of Aleta Bailey, a five year old child. The Defendant, Jo Ellen Bailey, the mother of the child, and her boyfriend, Larry Hake, were charged with criminal homicide. Both Defendants lived with the victim in the Defendant Bailey's mobile home which was located in a mobile home park. The victim's father was in the military service and stationed in a Southern state. In January, 1982, the police and Children's Services caused the child to be taken to the hospital as a result of a

complaint of child abuse instituted by a third party. Examination of the child revealed bruises indicating that the child had been assaulted. This incident was handled informally, and Hake and the Defendant agreed that Hake would leave the residence and that the Defendant would not abuse the child. Thereafter, the Defendant and the child resided alone in the mobile home. Approximately a month after the initial incident of assault, on February 17, 1982, Hake returned to the mobile home for several hours and ate dinner. The Defendant testified that the child misbehaved during dinner, and that she and Hake required the child to stand in a corner. Hake left the household at approximately nine o'clock p.m., and the Defendant testified that during his stay, no abuse occurred. After Hake left the residence, the Defendant bathed the child and testified that she saw no bruising whatsoever. Hake returned on February 18, the next day, at about one o'clock p.m., and took a nap. Defendant testified that the child was not feeling well, and remained in her room throughout the day. The Defendant, Hake, and the child remained in the home until about 4:30 on the afternoon of February 18. During this time, the Defendant testified that Hake slept, the child stayed in bed in her room because she had a cold, and the Defendant cleaned the kitchen. The Defendant testified that no abuse occurred during this time. At approximately 4:30 p.m. on February 18, the Defendant testified that Hake carried the child into the living room, stating that he found the child unconscious, and Hake immediately left the mobile home and summoned an ambulance. The Defendant testified that neither she nor Hake had done anything to the child to cause injury either on February 17, 18, or at any other time, although the Defendant did postulate that Hake may have suddenly beaten the child

immediately prior to carrying the child out into the living room and summoning the medical personnel. However, the mother testified that she heard nothing and that the mobile home where the parties lived was quite small. Paramedical personnel arrived at the mobile home within moments after 4:30 p.m. on February 18 and the child was immediately transported to the hospital. A medical examination of the child revealed an odor of alcohol about her and also showed innumerable injuries, including severe bite marks over various portions of her body, bruises over her entire body (arms, legs, hands, feet, head, face, vagina, and rectal area), a tear in the child's rectum and contusions inside the vagina, and an autopsy showed that the brain was grossly swollen as a result of many blows to the head. The bruises and bite marks over the entire body, including the face and head, had started to blacken and were not of extreme recent origin. The pathologist testified that the fatal blows to the head occurred from ten to twelve hours before the child's death from brain swelling. The autopsy also revealed the presence of alcohol in the child's blood. On the night before the child's death, after Defendant's boyfriend had, by Defendant's testimony, left the mobile home, a neighbor heard loud noises coming from the mobile home, as if someone were knocking furniture around. This same neighbor testified that several days prior to the death of the child, the Defendant stated that she wanted to "get rid" of her child and that the Defendant, on this occasion, hit the child on the head, knocking her down. The physicians who testified at trial stated that the child's death could have only resulted from an intentional beating occurring over an extended period of time prior to the death of the child. The jury convicted the Defendant of murder in the third degree.

Several months prior to trial, Detective Garber, the prosecuting officer, casually saw the Defendant at the York County Prison while he was there on other business. The Defendant remarked to the detective that she would like to speak with him some time. Several days later, the police officer did go down to the York County Prison and talked with her, although the specifics of her case were not discussed and the conversation led to the discovery of no new evidence. This conversation was not admitted into evidence against the Defendant, and the detective and defense counsel acknowledged at a subsequent hearing before Judge John Miller that the District Attorney had instructed the detective not to interrogate the Defendant.

Prior to trial, the Defendant, through her counsel, represented that she would testify against her boyfriend in exchange for a plea to manslaughter. The District Attorney tentatively accepted this arrangement pending an interview with the Defendant in the presence of her counsel. However, at this interview, the version given by the Defendant did not inculpate the boyfriend and was totally contradictory to the physical evidence available to the District Attorney, particularly the medical testimony as to the nature of the injuries and the cause of death. Furthermore, the Defendant denied any involvement so as to permit her to even enter a plea to involuntary manslaughter. Consequently, the plea agreement was rejected. In any event, the version related by the Defendant during this interview with the District Attorney was not used against her, even when she presented a completely different version at her trial. After the interview, the District Attorney also learned from the attorney for the Defendant's boyfriend that the Defendant had written her boyfriend, against whom she

promised to testify, and had told him that she would even "burn" him if she were called to testify and that, further, she was hopeful that he would soon be released from prison so that they could continue their co-habitation without interference from the child, Aleta Bailey. After a hearing, Judge James E. Buckingham ruled that the withdrawal of the plea bargain was not only in good faith but was the only available alternative.

After conviction by a jury before Judge Emanuel A. Cassimatis of the Court of Common Pleas of York County, Pennsylvania, in Wayne County, Pennsylvania, the site selected after a change of venue, appeals to the Pennsylvania Superior Court and Pennsylvania Supreme Court were denied and this Petition for Certiorari is now before your Honorable Court.

Summary of Argument

Several months prior to trial, Detective Garber, the investigating officer, spoke with the Defendant at the York County Prison pursuant to her request, despite a previous warning by the District Attorney not to talk to Ms. Bailey (Reproduced Record, Volume 2, Page 16). Although this was done in the absence of counsel, no evidence concerning the crime was gathered at this interview nor was any of the conversation used at trial or to her detriment. Absent such a showing she is not entitled to any type of relief.

A prosecutor is justified in withdrawing from a plea bargain when the Defendant fails to fulfill the agreement or there are other extenuating circumstances. In the instant case, the Commonwealth agreed to accept a plea to involuntary manslaughter on the condition that the Defendant testify against her boyfriend, Larry Hake, the Co-Defendant. The plea agreement was rejected because the Defendant did not admit any culpability which would support a plea to involuntary manslaughter, her statements were in direct conflict with known physical evidence and it was learned after the interview that the Defendant had written to her boyfriend and had indicated that she would not "burn" him by her testimony. The Commonwealth was therefore justified in withdrawing the plea bargain.

Prejudicial pretrial publicity was never established. Assuming *arguendo* that it was, there was no causal relationship between any such publicity and the Defendant's supposed loss of witnesses.

The District Attorney was entitled to try the case. Despite an earlier statement to the contrary, Mr. Ness had handled all prior proceedings, had never withdrawn his appearance and it had been his policy to personally assume trial responsibility for all homicides. In addition, the Defendant's petition to the Pennsylvania Supreme Court to appoint an out-of-county prosecutor was dismissed. In the absence of any proven impermissible prejudice, there was no error.

ARGUMENT

A. The Defendant's Sixth Amendment to counsel was not violated.

The Sixth Amendment provides that an accused shall enjoy the right "to have the Assistance of Counsel for his defense." This right, fundamental to our system of justice, is meant to assure fairness in adversary criminal process. *Gideon v. Wainwright*, 372 U.S. 335, 344, 9 L Ed 2d 799. As the United States Supreme Court stated in *Maine v. Moulton*, 54 U.S.L.W. 4039 (1985):

> The Sixth Amendment guarantees the accused at least after the initiation of formal charges, the right to rely on counsel as a "medium" between him and the State . . . (T)his guarantee includes the state's affirmative obligation not to act in a manner that circumvents the protection accorded the accused by invoking this right . . . (K)nowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation . . . as is the intentional creation of such an opportunity. Accordingly, the Sixth Amendment is violated when the state obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and the state agent.
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> 54 U.S.L.W. at 4042.

The cases have accordingly been responsive to proved claims that governmental conduct has rendered counsel's assistance to the defendant ineffective. *Moore v. Illinois*, 434 U.S. 220, 54 L.Ed.2d 424 (1977); *Massiah v. United States*, 377 U.S. 201, 12 L.Ed.2d 246 (1964).

However, cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the

constitutional violation. *United States v. Morrison*, 449 U.S. 361, 66 L.Ed.2d 564 (1981). The case law has reflected this approach in that the appropriate remedy for a particular violation of the right to counsel may be either: suppression of evidence obtained from an accused in the absence of his counsel, *id.*; reversal and remand for a new trial upon a showing that such evidence admitted at trial was "harmful", *id.*; denial of a new trial and affirmance of a conviction where no "harm" was demonstrated, *id.*; and automatic reversal and remand for a new trial in some instances without the need to show harm (citations omitted) *Commonwealth v. Shirey*, Pa. S. 481 A.2d 1314 (1984). More particularly, absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation may have been deliberate.

The Court must recognize that the action of the state must be a knowing exploitation of an opportunity to confront the accused without counsel being present. The state cannot be permitted to circumvent the protection afforded by this right. No such edition occurred in this case. Assuming, however, that the Sixth Amendment was violated in the circumstances of this case, the error was harmless and no prejudice resulted.

B. The Commonwealth was entitled to withdraw from the proposed plea bargain.

The landmark decision in the area of rights in regard to a plea bargain is *Santobello v. New York*, 404 U.S. 257, 30 L.Ed.2d 427 (1977), in which the prosecutor violated an agreement with the Defendant by recommending the maximum prison term at a sentencing hearing subsequent to the Defendant's entry of a guilty plea to a charge of possession of gambling records in

accordance with the plea of bargain. The Court vacated the judgment, stating that when a guilty plea rests in any significant degree on a promise or agreement of the prosecution, so that the promise or agreement can be said to be part of the inducement or consideration, then the promise or agreement must be fulfilled.

The American Bar Association Standards for Criminal Justice (1980), Standard 3-4.2(c), which was substantially revised apparently in response to the *Santobello* Case, provides that it is unprofessional conduct for a prosecutor to fail to comply with a plea agreement unless a Defendant fails to fulfill the agreement or unless other extenuating circumstances are present. Notwithstanding the clear implication of this ABA Standard in a majority of the cases in which the issue has arisen, courts have held that a prosecutor does have a right to withdraw from a plea bargain prior to the entry of a guilty plea by the Defendant in compliance with the agreement.

The petitioner states that the instant case conflicts with *State v. Brockman*, 277 Md. 687, 357 A.2d 376 (1976) and *Grey v. McClure*, S.E.2d 704 (1978), thereby rendering it ripe for action by your Honorable Court. In *Brockman*, Defendant gave a statement in which he totally incriminated himself and provided the prosecution with every fact and detail of the murder. However, since he did not recognize a photograph of his alleged principal, the State refused to comply with the bargain and Brockman was convicted of first degree murder. The Court of Special Appeals vacated the judgment and remanded to the trial court. The Court of Appeals held that Brockman was entitled to have the terms of the plea bargain enforced.

It is respectfully submitted that the instant case does *not* recite the facts of *State v. Brockman*, as the petitioner would have us believe (Petition for Writ of Certiorari, page 23). In this case, the Defendant did not admit her guilt and her recitation of the facts was in direct conflict with known physical evidence. In addition, it was later learned that she was corresponding with her co-defendant and assuring him that her testimony could not "hang" him. Interestingly enough, the Court in *Brockman* noted: "Of course, there may be situations in which the State may refuse to abide by a bargain it has entered, where, for example, a Defendant fails to cooperate sufficiently or materially misrepresents the facts in his testimony." Such is the case here. Indeed, this case is more akin to that of *Ellison v. State*, 56 Md. App. 567, 468 A.2d 413 (1983), in which the Court of Special Appeals held that the State was justified in revoking a plea bargain which was conditioned upon Defendant not being the robbery participant who shot victim, where further investigation revealed facts sufficient to charge him as actual killer.

In the *McClure* case, the Supreme Court of Appeals of West Virginia held that a prosecuting attorney or his successor is bound to the terms of a plea agreement once the Defendant enters a plea of guilty or otherwise acts to his substantial detriment in reliance thereon. Absent such a showing by the Defendant, the case was remanded to the Circuit Court. Thus the *McClure* case is of no assistance. The truth is that the viability of plea bargains depend on a wide variety of purely factual situations and the conflicts in the case do not warrant consideration by your Honorable Court. See 16 ALR 4th 1089 and *Mabry v. Johnson*, _____ U.S. _____, 81 L.Ed.2d 437 (1984).

C. The pretrial publicity did not deprive Defendant of due process.

The defense argues that as a result of pretrial publicity emanating from the District Attorney that she was deprived of three character witnesses. First, such publicity was not established; secondly, the causal relationship between any such publicity and loss of witnesses was not demonstrated; and thirdly, the Defendant did call a number of character witnesses to testify on her behalf at trial (N.T. 235-236, 333-334, 336). After the numerous pretrial hearings and disclosure at such hearings of evidence to be presented, certain witnesses that the Defendant said she wanted to call expressed a preference not to testify. The Defendant never subpoenaed such witnesses and they were never contacted or dissuaded by the Commonwealth from testifying. The witnesses were not spirited away by the Commonwealth nor was there any active interference by the Commonwealth in any fashion. In any event, the Defendant did call character witnesses at her trial.

D. The Defendant was not denied due process of law by the District Attorney personally trying the case.

The Defendant's argument in support of this argument is basically a restatement of the argument contained in support of prior issues. Petitioner admits that she has discovered no state, federal or Supreme Court cases on point but does cite *U.S. v. Bagley*, 641 F.2d 1235 (9th Circ. 1981), apparently for the proposition that prosecutors who have acquired information illegally should "insulate" themselves from such information. The *Bagley* case involved an alleged *Massiah* violation. In that case, although information was received from the Defendant by an informant, that information was not

used at trial and the prosecutors were careful to insulate themselves from that information by not receiving any notes, tapes or statements. In the instant case, Mr. Ness properly insulated himself from any information by not using it. Nor did the Commonwealth use it at trial. Assuming that the law in Pennsylvania is that statements made in pursuance of a plea bargain are inadmissible. See *Comm. v. Callaway*, 313 Pa. Super. 173 (1983), the Defendant can establish no prejudice here.

Respectfully submitted,

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